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ABSTRACT

This article provides an overview of court cases that affect the curricular speech of teachers. Despite the large number of cases, the law governing speech in the schools is anything but settled. Courts disagree as to the analytical framework that should be applied to such claims, although most courts use the standard articulated by the Supreme Court's "Hazelwood" decision, which states that school officials may regulate the classroom speech of teachers so long as those regulations are reasonably related to legitimate pedagogical concerns. High school curricular-speech cases began to appear shortly after the Supreme Court struck down a law that required university professors to sign loyalty oaths. Most court rulings on teachers' speech have been connected to "Hazelwood," though the courts have not applied "Hazelwood" with any measure of consistency. Nevertheless, many school districts use the "Hazelwood" case in defense since it creates a standard deferential to school officials. School lawyers also may draw on cases to claim that a teacher's speech is not a matter of public concern, and thus beyond the First Amendment. Context and definition are major concerns in these cases, as is the issue of due process. (RJM)

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Inquiry & Analysis

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The Conundrum of Academic Freedom

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Academic freedom claims are on the rise. At least six cases involving academic freedom issues were decided in 1996.[1] By the end of this year, three courts one step removed from the United States Supreme Court may well issue decisions involving academic freedom claims.[2]

Despite the number of cases, the law governing these cases is anything but settled. Some courts have stated that a high school teacher has a right of academic freedom "in choosing a particular pedagogical method for presenting the idea-content of a course, as long as the course is part of the official curriculum of the educational institution and the teaching method serves a demonstrable educational purpose." *E.g., Watson v. Eagle County Sch. Dist. Re-50*, 795 P.2d 768, 770 (Colo. Ct. App. 1990). Other courts have stated that a high school teacher has no right of academic freedom. *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 779 (10th Cir. 1991).

In addition to differing outcomes, courts disagree as to the analytical framework that should be applied to such claims. Most courts use the standard articulated by the Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), for the regulation of school-sponsored student speech. School officials may regulate the classroom speech of teachers so long as those regulations are reasonably related to legitimate pedagogical concerns. *E.g., Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719, 722 (2nd Cir. 1994). Nonetheless, other courts rely upon the standard set forth in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), for the regulation of a teacher's speech as a citizen. If the teacher's speech involves a matter of public concern, it is protected by the First Amendment, and the school may regulate it only if the school's interest in efficiently carrying out its duties outweighs the teacher's interest in speaking. *E.g., Martin v. Parrish*, 805 F.2d 583, 584-85 (5th Cir. 1986). In addition, the question upon which a large number of academic freedom cases turns does not involve the substantive inquiries of *Hazelwood* and *Pickering*. Instead, they turn on a procedural question: whether the teacher had reason to know that his or her speech would lead to discipline. *E.g., Bosford v. School Comm. of Sandwich*, 659 N.E.2d 1178 (Mass. 1996).

THE BEGINNINGS OF HIGH SCHOOL ACADEMIC FREEDOM

High school curricular speech cases began to appear shortly after the Supreme Court's decision in *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), striking down New York's infamous "Feinberg Law" which required university professors to sign loyalty oaths affirming that they were not affiliated with subversive organizations. In so doing, the Court celebrated the importance of academic freedom in broad theoretical terms, calling it a "special concern of the First Amendment." *Id.* at 603.

The three principle decisions of the era immediately following *Keyishian* were *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970), and *Mailloux v. Kiley*, a case that involved three reported decisions. 323 F. Supp. 1387 (D. Mass. 1971), 436 F.2d 565 (1st Cir.), 448 F.2d 1242 (1st Cir.). Because the language and the context of *Keyishian* was more theoretical than analytical, lower courts had to look beyond *Keyishian* for a doctrinal framework to resolve such claims.

Mailloux embodied the confusion that followed in the absence of direction from the Supreme Court. A district court issued a preliminary injunction that enjoined the dismissal of a teacher who had used the word "fuck" to explain the concept of taboo. On appeal, the Court of Appeals for the First Circuit upheld the preliminary injunction but appeared to back away from its prior decision in *Keefe*. *Mailloux*, 436 F.2d at 566; *see also Presidents Council Dist. 25 v. Community Sch. Bd. No. 25*, 457 F.2d 289, 294 n. 7 (2nd Cir. 1972) (commenting on the perceived retreat by the First Circuit). The case returned to the lower court which entered judgment in favor of the teacher, articulating a rather lengthy First Amendment test. *Mailloux*, 323 F. Supp. at 1392. The case rose again to the First Circuit which began its opinion by stating that its earlier remarks were not a retreat from *Keefe*. The court then affirmed the lower court's decision, but solely on due process

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1. The thoughts expressed herein are explained in greater depth in an article by the author to be published in 77 Nebraska Law Review No. 2, scheduled for release later this summer.

2. *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474 (4th Cir. 1996), *rev'd on banc*, 136 F.3d 364 (4th Cir. 1998); *Westbrook v. Teton County Sch. Dist.*, 918 F. Supp. 1477, 1482 (D. Wyo. 1996); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1011 (W.D. Va. 1996); *Locke v. Ferguson Reorganized School District R-2*, 896 F. Supp. 976 (E.D. Mo. 1996); *Bosford v. School Comm. of Sandwich*, 659 N.E.2d 1178 (Mass. 1996); *Wilder v. Jefferson County Sch. Dist.*, 942 P.2d 508, 602 (1997), *cert. granted*.

3. One case has already been decided, *Boring*, 136 F.3d 364. A case before the Colorado Supreme Court was argued on April 30, 1998, *Jefferson County Sch. Dist. v. Wilder*, Case No. 97 SC 292. Another case is pending before the United States Court of Appeals for the Eighth Circuit, *Locke v. Ferguson Reorganized Sch. Dist.*, Case No. 97-1506EMSL.

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grounds, noting that the court was unable to agree as to whether the First Amendment was implicated. *Wallace*, 448 F.2d at 1261.

The situation has not improved much since. The courts that have applied *Hazelwood* have not done so consistently. They have used *Hazelwood* with a procedural right of objective notice,[4] *Hazelwood* with a procedural right of subjective notice,[5] *Hazelwood* with no notice requirement,[6] *Hazelwood* as a balancing test,[7] and *Hazelwood* as *Hazelwood*.[8] Similarly, the courts that have applied the *Pickering* analysis have not been consistent either. Some courts hold that classroom speech involves a matter of public concern and therefore is entitled to First Amendment protection. *Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994). Other courts hold that it does not. *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (*en banc*).

Finally, the application of the notice requirement has not been consistent. Most courts that recognize this requirement, articulate an objective standard. *Ward*, 996 F.2d at 454. One court, however, required subjective notice. *Miller v. Jefferson County Sch. Dist.*, 942 F.2d 708, 665 (Colo. Ct. App. 1997), *cert. granted*. Other courts have expressly rejected the notice requirement. *Silano*, 42 F.3d at 723.

THE DEFERENTIAL STANDARD OF *HAZELWOOD*

For school attorneys litigating academic freedom cases, advantages and disadvantages accompany each of the *Hazelwood* and the *Pickering* tests, and those considerations should be weighed as part of any litigation strategy.

The primary advantage of the *Hazelwood* test is that it creates a standard deferential to school officials, essentially rational basis review in the school setting. *Compare Hazelwood*, 484 U.S. at 273 (school officials decision to restrict speech is constitutional so long as it is reasonably related to legitimate pedagogical concerns) *with United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973) (nontargeted classifications are permissible so long as they are rationally related to a legitimate governmental purpose). The *Hazelwood* analysis is unique in judicial categorization, that is, so long as the court can categorize the school officials' decision as being reasonably related to legitimate pedagogical concerns, the inquiry is over with the school district prevailing without any additional examination of the relative merits of the district's decision.

A second advantage of *Hazelwood* is the body of established case law upon which school districts can rely. *Silano*, 42 F.3d at 722; *Ward*, 996 F.2d at 452; *Miles*, 944 F.2d at 778; *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991); *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th Cir. 1990). School officials have a legitimate pedagogical interest in shaping the curriculum and requiring teachers to adhere to it. *Kirkland v. Northside Independent School District*, 890 F.2d 768, 795 (5th Cir. 1989). They also have a legitimate pedagogical interest in ensuring that teachers exhibit sound professional judgment. *Miles*, 944 F.2d at 778. Finally, they have a legitimate educational interest in regulating sexually explicit or excessively vulgar speech. *Virgil v. School Bd. of Columbia County*, 862 F.2d 1517, 1523 (11th Cir. 1989).

A disadvantage of *Hazelwood*, however, is that judges have been reluctant to rule in favor of a school district on a motion to dismiss even where the judge senses that the case has little merit. *Boring*, 136 F.3d at 374 (Hamilton, J., dissenting) ("In all likelihood . . . this case would be resolved in favor of the Board at the summary judgment stage, as several pedagogical concerns probably justified the Board's action. At the Rule 12(b)(6) stage, however, we have no basis for determining whether the Board's restriction reasonably related to legitimate pedagogical concerns."). Thus, reliance upon *Hazelwood* establishes a deferential standard but at the possible price of subjecting the school district to the costs and burdens of discovery that precede a motion for summary judgment.

Of course, if the school district already has the burden of making an evidentiary showing such as in a dismissal hearing, then *Hazelwood* adds nothing to the school district's evidentiary burden. Conversely, if *Hazelwood* is relied upon in responding to a complaint brought under 42 U.S.C. § 1983, the school district might not escape at the motion to dismiss stage.

THE RISKS AND REWARDS OF *PICKERING*

The *Pickering* analysis offers school districts the possibility of a great reward, but comes with it a significant risk. The reward is that if the court finds that the teacher's speech was not a matter of public concern, the First Amendment is not implicated, and such a claim can be eliminated by a motion to dismiss. The risk is that the court may find that a teacher's classroom speech is a matter of public concern. *E.g. Blum v. Schlegel*, 18 F.3d 1005 (2nd Cir. 1994). Given that public education involves public monies, state authority and is so closely linked to the democratic process, this conclusion has instinctive appeal, but as explained below, appeal that is doctrinally flawed.

If the court finds that the speech does involve a matter of public concern, it proceeds to a balancing test, weighing the teacher's interest in speaking against the school district's interest in maintaining discipline. Balancing tests, unlike exercises in categorization such as *Hazelwood*, afford no deference to the school district's decision. A court could determine that while the school district's decision was reasonably related to legitimate pedagogical concerns, the teacher's interest still outweighed that of the school district. In short, the ultimate arbiter of what course of conduct was best for the school district becomes a court.

The Board of Education of Buncombe County, North Carolina, recently succeeded in escaping the reward of *Pickering* and establishing law that is very favorable to school boards. *See Boring v. Buncombe County Board of Education, supra*. There, a drama teacher was transferred after having her students stage a play with controversial subject matter. The teacher brought suit under section 1983, alleging a violation of her First Amendment rights. The district responded with a motion to dismiss relying on *Pickering*. The district court granted the motion. A panel of the Fourth Circuit reversed the district court's order. *Boring v. Buncombe County Board of Educ.*, 98 F.3d 1474 (4th Cir. 1996). Nonetheless, the panel's opinion was vacated pending *en banc* review.

The *en banc* court by a seven to six vote reversed the panel's decision and reinstated the order of dismissal. *Boring*, 136 F.3d 364. The court, relying on an earlier decision by the Fifth Circuit, held that a teacher's conflict with her supervisors as to the appropriate content of the curriculum was an ordinary employment dispute that was not covered by the First Amendment. *Id.* at 369, a conclusion that is consistent with language used in a number of earlier cases, including cases that did not expressly rely upon *Pickering*. *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1007-08 (7th Cir. 1990) (First Amendment does not authorize teachers to ignore curricula or directives of supervisors); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3rd Cir. 1990) (teacher has no right of academic freedom that extends to the choice of

4. *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993).

5. *Miller v. Jefferson County Sch. Dist.*, 942 F.2d 708, 665 (Colo. Ct. App. 1997), *cert. granted*.

6. *See Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991).

7. *Davies v. Ferguson- Florr. Sch. Dist.*, 820 F. Supp. 476 (E.D. Mo. 1993); *Miller*, 942 F.2d at 665.

8. *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723 (2nd Cir. 1994); *Miles*, 944 F.2d 773.

classroom management techniques); *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) ("The first amendment does not require that each nontenured professor be made a sovereign unto himself.")

The case upon which the *Boring* court relied drew a clear line for determining whether a teacher's speech involved a matter of public concern entitling it to First Amendment protection: "[I]ssues do not rise to a level of 'public concern' by virtue of the speaker's interest in the subject matter; rather they achieve that protected status if the words or conduct are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee* of the school district." *Kirkland*, 890 F.2d at 708-09 (emphasis in original).

While this distinction may seem simplistic, it points toward a central incongruity often overlooked in academic speech cases. While the First Amendment exists to protect private citizens from the excesses of state actors, a teacher carrying out his or her duties in the classroom *is a state actor*. Thus, unlike traditional First Amendment cases where the plaintiff is seeking protection from state power, here a state actor is seeking constitutional protection for an exercise of state power. The Supreme Court already has determined that the government's decision to have its employees say one thing and prohibit them from saying another does not implicate the First Amendment. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), a sentiment that was recently expressed by the Court in the academic setting:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.

Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2518 (1995).

Thus, *Kirkland* and *Boring* may point a way through the morass of academic freedom law. The First Amendment exists to protect private speech from government interference; it does not authorize state actors to interfere with the message that the government has chosen to convey. Nonetheless, until affirmatively decided by the Supreme Court, school districts should still carefully weigh the costs and benefits of proceeding under *Pickering* and *Fitzgerald*.

THE IMPORTANCE OF CONTEXT AND DEFINITION

A principal reason for the confusion of the case law is that the term academic freedom has been allowed to go undefined, and therefore the scope of the right remains undefined as well. In ordinary parlance, the term academic freedom can mean any number of things: Freedom of citizens to give and receive instruction on subjects of their mutual agreement; freedom of extracurricular comment and association; freedom to inquire and publish; freedom of the university to operate as a self governing entity; and freedom to teach what one sees fit to teach.

Ordinary parlance, of course, does not translate into constitutional law. While some of these ordinary understandings of academic freedom have been translated into constitutional law,[9] that is not true for all of these understandings. As the Eleventh Circuit has aptly noted:

> *Keyishian* dealt with that brand of regulation most offensive to a free society: loyalty oaths. The Court's pronouncements about academic freedom in that context, however, cannot be extrapolated to deny schools command of their own courses." *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991).

Thus, in any curricular speech case school districts should place the teacher's claim in context so that the court will focus on the specific issue rather than be distracted by rhetoric that arose in different circumstances.

WHAT THE SUPREME COURT HAS AND HAS NOT HELD

While lower courts have accepted the Supreme Court's statement in *Keyishian* as establishing a right of academic freedom consistent with ordinary parlance, the Supreme Court itself has not gone so far. In fact, when a case reached the Supreme Court involving a high school teacher's curricular speech, the Court declined an invitation to ratify the rhetoric of *Keyishian*, responding to the teacher's argument that his right of academic freedom was at stake by stating that the Court would not address whether the teacher had proved *or even stated* a claim under the First Amendment or the Due Process Clause. *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 n. 12 (1986). Two years later in *Edwards v. Aguillard*, Justice Brennan, the author of *Keyishian* had this to say about academic freedom:

> The Court of Appeals stated that academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment. But, in the State of Louisiana, courses in public schools are prescribed by the State Board of Education and teachers are not free, absent permission, to teach courses different from what is required. "Academic freedom," at least as it is commonly understood, is not a relevant concept in this context.

482 U.S. 578, 586 n. 6 (1987) (citations and quotation omitted). At the very least Justice Brennan's statement here implies that whatever he might have been saying in *Keyishian*, the First Amendment does not authorize a teacher to exercise state power outside the state's chain of command.

THE TROUBLESOME ISSUE OF NOTICE

Even courts that recognize that a teacher does not have a First Amendment right to operate outside a school district's chain of command have ruled in favor of teachers on the basis of a procedural right, asserting that the teacher could not be disciplined unless the teacher had notice that her speech would land her in trouble. *Hosford v. School Comm. of Sandwich*, 659 N.E.2d 1178 (Mass. 1996). While this right falls neatly into a general sense of fairness, its constitutional underpinnings are somewhat unclear and unfortunately likely to remain unclear until substantive issues underlying academic freedom are clarified.

At bottom, the issue of notice is a due process concern. *Bradley v. Pittsburgh Board of Educ.*, 910 F.2d 1172, 1176 (3rd Cir. 1990). Thus, where a teacher has a property interest in continued employment, the teacher is entitled to some sort of notice as to the sort of conduct that might lead to a deprivation of that employment. Similarly, where citizens have a general right of speech, they cannot be subjected to laws that might impose a sanction for speaking unless those laws provide the citizens with adequate notice.

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9. *See generally Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) (discussing the "four freedoms" of the university); *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968) (protecting teacher's right to comment as a citizen on matters of public importance); *Keyishian v. Board of Regents of the Univ. of the State of New York*, 385 U.S. 589 (1967) (protecting teachers private rights of association); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute prohibiting teaching the German language unconstitutional).

Nontenured teachers, of course, have no property right to which the Due Process Clause's demand for notice can attach. They can be nonrenewed for any reason or no reason and wholly without notice. Similarly, as discussed above, whether a teacher's classroom speech is protected by the First Amendment at all is somewhat unclear. If not, then there is no First Amendment right for the procedural right to protect. Thus, as noted above, a predicate for determining whether a nontenured teacher is protected by a procedural right of notice is resolving the underlying substantive issues concerning curricular speech.

In the meantime, school districts can respond to notice arguments by reference to *Bradford* which rejected a claim that school-sponsored speech could be regulated only pursuant to prior written regulations. 882 F.3d at 273 n.6, and *Silano* which adopted this position when a lecturer was disciplined for a classroom presentation. 82 F.3d at 725.

In addition, in an effort to prevent the law from becoming more confused than it already is, school districts should take care to point out that the notice requirement emanates from the Due Process Clause rather than the First Amendment. *Bradley*, 900 F.2d at 1176.

Finally, school districts should take care not to make decisions that might give rise to a notice claim or decisions that might be perceived as tainted with viewpoint discrimination. As a practical matter, it is doubtful that a court would interfere with a district's decision to nonrenew a probationary teacher because he used poorly formed analogies or used a student's sibling as an example of misconduct, both of which involve speech, and speech for which the teacher could say that he had no notice of the consequences of engaging in such speech. Nonetheless, courts do seem ready to intervene where they sense that a board is imposing a parochial sense of morality and order after the speech has occurred. *See Bosford, supra*; *Wallace, supra*. The point the school district should try to explain is that it can nonrenew teachers for exercises of poor judgment and poor judgment does not become endowed with constitutional protection merely because it is manifested through speech.

CONCLUSION

The issue of regulating the curricular speech of teachers has never been easy. Given the confused state of the case law, the Supreme Court may be ready to accept a case that directly addresses this issue. Until controlling guidance is provided by the Court, however, school districts confronted with academic freedom cases should seriously consider the costs and benefits of their litigation strategy. The goal of any strategy, however, should be to present the issue in the narrowest terms possible.

Case Notes

Superintendent was entitled to qualified immunity from teacher's section 1983 claim based on violation of the teacher's equal protection rights because the teacher failed to allege facts sufficient to establish that the superintendent intended to discriminate against the teacher.

Brewer v. Hammonds, No. 95-6827 (11th Cir. February 7, 2008)

http://www.law.emory.edu/11circuit/feb08/95-6827.man.html

African-American female teacher was among several candidates interviewed for two vacant principal's positions. A screening committee recommended five of the applicants for interviews with the superintendent. The teacher was among the five selected which included two black males, one white male and one black female. The superintendent selected one of the black males and the white male for the positions. The board accepted the superintendent's selections and appointed the candidates to the positions. The successful applicants and the teacher all met the minimum qualifications for the principal's position.

The teacher filed suit against the school board and the superintendent in both his individual and official capacities. She alleged that she had been discriminated against based on sex, race and age in violation of her rights under title VII and the ADEA. In addition, she brought claims of sex and race discrimination under section 1983 based on violation of her equal protection and due process rights. The district court denied the superintendent's motion for summary judgment on the equal protection claim based on the defense of qualified immunity. In explicitly rejecting the qualified immunity defense, the district court found that the teacher had produced sufficient evidence of conduct on the superintendent's part that violated her equal protection rights. It concluded that such conduct violated clearly established law.

The appellate court held that the superintendent was entitled to qualified immunity from the teacher's section 1983 claim based on equal protection. It reversed and remanded the case with instructions that the district court should enter judgment for the superintendent in his individual capacity on the equal protection claim. The appellate court rejected the teacher's argument based on *Johnson v. Jones*, 515 U.S. 304 (1995), that it lacked jurisdiction over the case because the district court's denial of qualified immunity was based on an issue of "evidence sufficiency" and not an issue of law. It disagreed both with the teacher's interpretation of the district court's order and her assessment of *Johnson*. The appellate court read the district court's ruling denying qualified immunity as being based on the belief that a reasonable person in the superintendent's position would have known his conduct violated clearly established law, rather than being based on "evidence sufficiency." It pointed out that a denial of qualified immunity involves two determinations: (1) that taking the facts in the light most favorable to the plaintiff, could a reasonable jury find that the defendant engaged in certain conduct, and (2) that such conduct violated clearly established law such that a reasonable person in the defendant's position would have had notice that his actions were unlawful. The appellate court stated that *Johnson* merely prevents an interlocutory appeal based on the district court's first determination alone. It pointed out that it is well within an appellate court's discretion to review the record to determine whether the plaintiff has pled facts sufficient to allege a violation of a constitutional right before reaching the issue of clearly established law.

Turning to the teacher's claim that the superintendent had violated her equal protection rights, the court noted that a plaintiff must prove an intent to discriminate in order to establish an equal protection violation. It found that the teacher failed to present evidence that would allow a reasonable jury to find intent. It found the superintendent's statement concerning the need for more male principals and his letter to the EEOC regarding the ratio of black to white teachers in the school system were unrelated to the teacher's case. It concluded that this evidence could not serve as a basis from which a jury could find that the superintendent intended to discriminate against the teacher.

School psychologist failed to state a cause of action for sex discrimination under title VII based on hostile work environment because the school's remedial action resulted in cessation of the complained of conduct. However, she stated a valid cause of action for sex discrimination under title VII based on quid pro quo sexual harassment.

Reinhold v. Commonwealth of Virginia, No. 06-2506 (4th Cir. February 6, 2008)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=4&navby=case&no=062506P